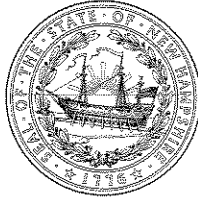


**ATTORNEY GENERAL  
DEPARTMENT OF JUSTICE**

33 CAPITOL STREET  
CONCORD, NEW HAMPSHIRE 03301-6397

KELLY A. AYOTTE  
ATTORNEY GENERAL



ORVILLE B. "BUD" FITCH II  
DEPUTY ATTORNEY GENERAL

July 10, 2006

Paul R. Bergeron, City Clerk  
City of Nashua  
P.O. Box 2019  
Nashua, New Hampshire 03061-2019

Re: Pennichuck Water Works/SmartWater.org

Dear Clerk Bergeron:

On December 21, 2005, you filed a complaint with this Office against Pennichuck Water Works and SmartWater.org regarding possible violations of state laws relative to campaign expenditure limitations and political advertising. For the reasons described below we conclude that there were no state law violations and that no action by this Office is warranted. We are now closing our file on this matter.

You complaint raises several issues, each of which will be addressed in turn.

Campaign Receipt and Expenditure Reports

The Attorney General's Office enforces the State election laws. RSA 7:6-c. Chapter 664 of the Revised States Annotated regulates campaign finance at State elections. RSA 664. The duty to file campaign receipt and expenditure reports does not, however, apply to local elections.

The provisions of this chapter **shall apply to all state primary, general, and special elections**, but shall not apply to presidential preference primaries. **The provisions relating to political advertising, RSA 664:14 through 17-a, shall additionally apply to city, town, school district and village district elections. . . .**

RSA 664:1, Applicability of Chapter (emphasis added). Only the provisions relating to advertising apply to municipal elections.

To the extent that it is alleged that Pennichuck Water Works violated RSA 664:4 by making a political contribution in excess of \$5000, we conclude that RSA 664:4 does not apply to a city election, therefore, under state law, no further analysis is warranted. In reaching this conclusion we take no position on whether contributions subject to city regulation were made or whether, if such contributions exist, they exceed \$5000.

Furthermore, were the city election subject to RSA 664, the cost of the ads at issue would constitute a political contribution only if they were coordinated with the candidate. An individual person, which includes a corporation, generally may engage in unlimited political speech in communications, such as the ads at issue, provided the speech is not coordinated with the candidates identified in the speech. *Buckley v. Valeo*, 424 U.S. 1 (1976). An expenditure, such as purchasing an ad, which benefits a candidate becomes a contribution to the candidate only if the candidate is afforded an opportunity to and voluntarily acts to influence the content, placement, or timing of the ad. While the ads at issue quote the candidates, provided these quotes are taken from public statements by the candidates and were chosen by the sponsor of the ad and not the candidate, the quotes alone do not establish coordination. Therefore, even were the election at issue subject to the provisions of RSA 664, it would be necessary to establish that the ads were coordinated with particular candidates before the expense of the ads could be analyzed as political contributions.

#### Political Advertising – Identification requirements

Political advertising in city elections are subject to RSA Chapter 664. Political advertising “means any communication, including buttons or printed material attached to motor vehicles, which expressly [~~or implicitly~~] advocates the success or defeat of any party, measure or person at any election.” RSA 664:2, VI. The Federal District Court for New Hampshire has enjoined the enforcement of the “or implicitly” phrase in the statute. *Stenson v. McLaughlin*, Docket no. 00-514-JD (D.N.H. Aug 24, 2001). Therefore, a communication is political advertising only if it explicitly advocates for the success or defeat of a party, measure, or person at an election.

To the extent that it is alleged that SmartWater.org violated RSA 664:14 because it was responsible for communications that advocated “Vote for change” and did not adequately identify itself in those communications we conclude that these communications do not explicitly advocate for the success or defeat of an identifiable party, person, or measure, therefore are not political advertising regulated by state law and further analysis under state law is not warranted.

To the extent that it is alleged that Pennichuck Corporation failed to comply with RSA 664:14 in its ads which explicitly advocate for the election of identified candidates for city office because they did not name any responsible natural person, we conclude that Pennichuck substantially complied with the statute. Pennichuck included its corporate name and address. The pertinent provisions in RSA 664:14 were most recently amended prior to the federal district court striking the prohibition on corporate political contributions. *See Kennedy v. Gardner*, 1999 WL 814273 at 8 (No. CV 98-608-M. D.N.H. September 30, 1999). As a result the general requirement established by the other provisions of RSA 664:14 that a political ad must always

include the name of some natural person, does not apply to the circumstance where a corporation is the person responsible for a political ad that explicitly advocates for the election or defeat of an identified candidate. It would apply were the corporation advocating for or against a measure.

Political advertising to promote the success or defeat **of a measure** by a business organization, labor union, or other enterprise or organization shall be signed. The name of the enterprise or organization shall be indicated **and the chairman or treasurer of the enterprise or organization shall sign his name and address.** Nothing in this section shall be construed to permit contributions which are prohibited under RSA 664:4.

RSA 664:14, II.

#### State Enforcement of Municipal Ordinance Provisions

Your letter to this Office did not explicitly seek enforcement of Nashua's city ordinances by the State, however, you did provide us with a copy of your letter dated November 2, 2005, directed to the subject of your complaint which did provide copies of ordinance sections which to some extent appear to incorporate state law by reference. Section 31 of the Nashua ordinance, in pertinent part, states "municipal elections shall be deemed to be elections within the meaning of all penal statutes relating to offenses against the purity of elections." RSA Chapter 666 is entitled "Provisions for the Purity of Elections." Even if the Nashua city ordinance is properly understood to incorporate the provisions of RSA Chapter 666 by reference and even if incorporation by reference satisfies the requirements for penal provisions in a city ordinance and is an authorized act for a city to make, subjects we decline to take a position on at this time, none of the provisions of Chapter 666 relate to the campaign finance and political advertising issues presented in this complaint.

Therefore, the question of enforceability and the role in enforcement, if any, for the Attorney General's Office raised by your letter or by Pennichuck's response to the complaint are moot in this case. While generally the Attorney General's Office does not enforce municipal ordinance provisions, in part out of comity to municipal government's prerogative to enforce its own ordinances, we take no position at this time on whether in the right circumstance election related ordinances, the violation of which constitutes a crime, might be enforced by the Attorney General pursuant to RSA 7:6-c or RSA 666:8. *See also* RSA 49-C:31; Nashua Ordinance Sec. 7-59. For these reasons the Attorney General's Office will take no action relative to the alleged violations of the Nashua city ordinances.

#### Conclusion

We conclude that there is no basis for this Office to take action in this case and are closing our file on this matter. We are enclosing copies of the responses made to the complaint by legal counsel for Pennichuck, as they raise several legal questions relative to the enforceability of its ordinances which the City of Nashua may wish to have is legal counsel

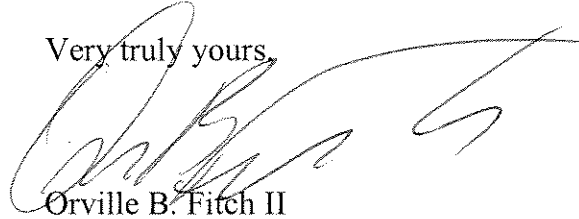
City Clerk Paul R. Bergeron

July 10, 2006

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review. A copy of this closure letter and attachments will be also provided to the Chairmen of the Legislative policy committees that address election law to ensure the responsible legislative committees are aware of statutory issues presented by this matter.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Orville B. Fitch II', with a long, sweeping horizontal line extending to the right.

Orville B. Fitch II  
Deputy Attorney General  
bud.fitch@doj.nh.gov  
(603) 271-1238

OBF/psm

cc: Honorable William M. Gardner, Secretary of State  
Senator Robert Boyce, Senate Internal Affairs Committee Chairperson  
Representative Michael D. Whalley, House Election Law Committee Chairperson  
Pam Smarling, Election Law Research Staff  
Pennichuck Corporation, C/O legal counsel, Mark C. Rouvalis, Esq.

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